

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

HOWARD INDUSTRIES, INC.

and

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL
UNION NO. 1317**

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Case 15-CA-131447

**General Counsel’s Reply Brief to Respondent’s Answering Brier to General Counsel’s
Cross-Exceptions to the Administrative Law Judge’s Decision**

The General Counsel, through the undersigned Counsel for the General Counsel, pursuant to Section 102.46 of the Board’s Rules and Regulations, files this Reply Brief to Respondent’s Answering Brief to the General Counsel’s Cross Exceptions to the Administrative Law Judge’s Decision.

A. The Termination of Gregory Jones Violated the Act

In its Answering Brief, Respondent asserts that it did not violate the Act because Jones’ conduct was not protected by the Act. Respondent makes two arguments: 1) Jones’ conduct violated the no-strike clause in the parties’ collective bargaining agreement (“CBA”); and 2) Jones’ conduct was simply not conduct that is protected by the Act. However, both arguments fail under scrutiny.

1. The No-Strike Clause Does Not Apply

As for the no-strike clause, in its Cross-Exceptions, the General Counsel explained how the language of the clause does not apply to Jones' activity – Jones was not engaged in activity prohibited by the clause because Jones' activity was not “designed to interfere to curtail or interfere with production.” (Joint Exhibit 2, p. 2) Jones was enforcing a contract right, not intentionally acting to impede production at the facility.

However, there is a second reason why Jones' activity was not prohibited by the clause – Jones was not engaged in a strike or work stoppage. A strike (or work stoppage) is a tool that employees use to exert economic pressure on employers to bend employers to their will (just as employers use lockouts to pressure employees to accept terms they oppose). This is not what Jones did. Jones did not take his action to force or pressure Respondent to change or alter its policy or bargaining position on some unrelated term or condition of employment. On the contrary, Jones left work consistent with the *existing* terms of the CBA (as he interpreted it). He was not seeking to pressure Respondent into taking action, but, rather, following the provisions of the contract. It is mere happenstance that asserting this particular contractual right resulted in his leaving work; his conduct is not thereby transformed into a strike or work stoppage.

Further, and in a similar vein, the Board has acknowledged that not all instances of an employee leaving work or stopping work is a “strike” or “work stoppage.” For example, as stated in *St. Barnabas Hospital*, 334 NLRB 1000 (2002), *enfd. NLRB v. St. Barnabas Hospital*, 46 Fed Appx. 32 (2d Cir. 2002), “[t]he Board has long held that a refusal to perform voluntary work does not constitute an unprotected partial strike,” relying on *Dow Chemical Company*, 152 NLRB 1150 (1965) (discharge for refusal to work overtime unlawful because the overtime was voluntary rather than mandatory). Applying the 12-hour rule in the CBA as he understood it, and

pursuant to the grievance he had previously filed on behalf of his crew members, Jones believed the overtime was voluntary, not mandatory. To the extent Respondent wanted Jones and the others to voluntarily work more than 12 hours that day, Jones refused. Thus, Jones' conduct was not a "strike" or "work stoppage." Significantly, Respondent did not terminate Jones for violating the no-strike clause but, rather, Respondent terminated Jones (ostensibly) for violating a plant rule. It appears that Respondent itself did not believe Jones had violated the no-strike clause, the defense being raised only after the termination.

2. Jones' Activity was Protected

As for Respondent's assertion that Jones' activity was simply not the sort protected by the Act, Respondent cites two cases; however, both are easily distinguishable. In *House of Raeford Farms*, 325 NLRB 463 (1998), the evidence showed, and the administrative law judge found, that each employee's individual motivation was simply to start their Thanksgiving holiday early. The employees in question made no mention of enforcing the terms of their collective bargaining agreement, or engaging in any other form of concerted protest. Consequently, their conduct was neither protected nor concerted.

Similarly, in *Bird Engineering*, 270 NLRB 1415 (1984), the employees were not seeking to enforce the terms of a collective bargaining agreement (the employees were not represented by a union). Instead, the employees were unhappy with a new rule that prohibited them from leaving the premises during their lunch break. The Board found that, while their concern and actions were concerted, they did not engage in conduct that was protected by the Act; instead, they simply ignored the rule. Consequently, their conduct, while concerted, was not protected.

While the current matter and Respondent's cases involve employees being disciplined for leaving work, the comparison is superficial. The employees in Respondent's cases were not

seeking to enforce or protest any matter but, instead, simply trying to have their way, whereas Jones was seeking to enforce a contractual right, which, as explained in the Cross Exceptions, is protected concerted activity.

In attempting to distinguish the *Mike Yorosek* cases cited in the Cross Exceptions, Respondent asserted that Jones had previously left work without permission. However, contrary to Respondent's assertion, Jones' May 2014 discipline involved him leaving work before he completed his mandatory daily 12 hours of overtime. The prior instance resulted from what was essentially a misunderstanding. The practice had been that Jones, under certain circumstances, could leave work even though there were still tanks to be completed, and his coworkers finished his work for him. (Tr. 40-41) However, on May 15, 2014, Jones failed to personally notify his supervisor he was leaving before he completed his mandatory 12 hours (8 hours of regular and 4 hours of overtime) but, instead, asked a coworker to do so. (Tr. 42) The coworker did not notify the supervisor and Jones was disciplined for leaving work without permission. (Tr. 42) In contrast, on June 10, 2015, Jones left work only after: (1) Respondent had not told employees they were required to work a double shift (8 regular and 8 overtime hours), (2) Jones had completed the mandatory 12 hours (8 regular and 4 overtime hours), and (3) after he notified his supervisor that he was unwilling to voluntarily work more than the required 12 hours.

Jones' departure on May 15, 2014, neither protested nor sought to enforce the collective bargaining agreement, while his decision to leave work on June 10, 2014, was directly attributable to his intent to enforce the contract. Significantly, Respondent admits that on the same day that Jones left work after 12 hours, Jones informed his supervisor that he and another employee had filed a grievance because the supervisor had forced the employees to work more than twelve hours, even though it was not a designated double shift, the previous Friday. Given

this, it is evident that Jones' conduct on June 10, leaving work after 12 hours, was in support of the CBA and his grievance. Therefore, as explained more fully in the Cross Exceptions, Jones' activity was protected concerted activity and his termination violated the Act.

Finally, it should be noted that none of the final warnings introduced into evidence by Respondent (Respondent Exhibit 1), ostensibly to support the argument that other employees have been disciplined for the same reason as Jones, appear to have been issued to an employee who left work after 12 hours on a day the employees were not told they were expected to work a double.

B. Deferral was Not Appropriate

Respondent asserts an arbitrator's award is not repugnant to the Act simply because it is inconsistent with what the Board would decide. On the contrary, an arbitrator's award is repugnant to the Act only if it reaches a result that is "palpably wrong," i.e., the arbitrator's award is not susceptible to an interpretation consistent with the Act. In the instant case, the Arbitrator's Award (Respondent Exhibit 3) is not simply different than what the Board would have decided, or inconsistent with what the Board would have decided but, rather, it is inconsistent with the Act itself.

Jones' refusal to work was an assertion of a reasonably based contractual right and, as such, was concerted activity against which no discipline may be imposed. The Board has stated when an employee makes an attempt to enforce a collective bargaining agreement, he is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966). As explained more fully in the Cross Exceptions, the Arbitrator's Award effectively held that Jones' termination was lawful *even though* he was terminated for engaging in protected concerted

activity, a decision in violation of *Interboro*. Section 7 of the Act gives employees the right to engage in concerted activities for the purpose of collective bargaining or for other mutual aid or protection. There is no interpretation of the Act that would permit an employer to terminate an employee for engaging in protected concerted activity; thus, the Arbitrator's Award is repugnant to the Act and must be disregarded.

Respondent also asserts that the General Counsel took certain statements of the Arbitrator out of context, asserting that the findings were his findings as they pertained only to the CBA and not as they pertained to the unfair labor practice charges (i.e., the statutory issue). However, nothing about the statements suggest the Arbitrator is limiting them to his analysis of the terms of the CBA as opposed to the Act. This is especially true given the breadth of the assertions (and, notably, they were not located in a separate section of the Award). On the other hand, even if it is true that the statements pertain only to the CBA, the result is the same – deferral was inappropriate.

As an initial matter, it should be noted that the *Olin* analysis provides only a rebuttable presumption. *Babcock v Wilcox*, 361 NLRB No. 132, *6 (2014) (emphasis added).

In *practice*, the standard adopted in *Olin* amounts to a conclusive presumption that the arbitrator 'adequately considered' the statutory issue if the arbitrator was merely presented with facts relevant to both an alleged contract violation and an alleged unfair labor practice. The presumption is theoretically rebuttable, but, as indicated above, the burden is on the party opposing deferral to show that the conditions for deferral are not met.

Id. The Board noted that it was often a practical impossibility to show that an arbitrator did not consider the statutory issue and found, "[i]n our view, deferral in such circumstances amounts to

abdication of the Board's duty to ensure that employees' Section 7 rights are protected." *Id.* So concerned was the Board about this that it was the reason the Board decided to change the deferral standards. *Id.* ("Accordingly, we have decided to modify our deferral standard as follows."). Fortunately, in the current matter, it is not a practical impossibility to show that the Arbitrator did not consider the statutory issue.

Even if the CBA allows Respondent to terminate Jones under the circumstances herein, i.e., Respondent had "just cause" under the agreement to do so, this conclusion does not automatically determine whether Jones engaged in protected concerted activity.¹ That Jones violated a plant rule does not mean Jones did not *also* engage in protected concerted activity while doing so (see *Interboro*, supra, and the cases cited in the Cross Exceptions). Thus, if the Arbitrator's analysis in these paragraphs is limited only to the terms of the CBA, then the Arbitrator failed to consider one of the statutory issues. While the Arbitrator determined Respondent did not terminate Jones because of his union activity, i.e., filing grievances, nowhere does the Arbitrator even implicitly consider or decide whether Respondent terminated Jones because he was enforcing the CBA, other than in these paragraphs. Thus, if Respondent's argument is to be credited, because the Arbitrator did not consider the statutory issue of whether Respondent terminated Jones because of his protected concerted activity (as opposed to his union activity), then deferral is inappropriate.

C. Jones is Entitled to the Backpay Amount Calculated as of May of 2015

Respondent argues that the backpay period should have ended in either September of 2014, because Steward Jones was unable to work, or December of 2014, because Steward Jones

¹ See the initial Exceptions to the Administrative Law Judge's Decision.

stopped looking for work. However, Respondent has failed to meet its rather high burden, as explained in the Cross Exceptions.

As for Respondent's assertion that the backpay period should end in December of 2014 because Steward Jones allegedly stopped looking for work, Respondent has failed to meet its burden. As noted in the Cross Exceptions, Respondent has the burden of establishing affirmative defenses to mitigate its liability, including willful loss of interim earnings. *Midwestern Personnel, Inc.*, 346 NLRB 624 (2006). Respondent does not meet this burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *Id.* at 625-26. It is Respondent's burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work. *Id.* Respondent must identify specific jobs that were available; however, the mere existence of "help wanted" ads does not satisfy this burden. *Id.* Doubts, uncertainties, or ambiguities are resolved against the wrongdoing Respondent. *Id.* Respondent has failed to identify any specific jobs that were available.

As for Respondent's assertion that the backpay period should end in September of 2014 because Steward Jones was allegedly unable to work, Jones, in his Backpay Claimant Forms (Respondent's Exhibit 4) states that he searched for work during that time. During the fourth quarter of 2014, Steward Jones applied for work at Church's Chicken, Fast Mart, Home Depot, Auto Zone, Advanced Auto Parts, and O'Reilly Auto Parts. While Jones might have been under the impression he have been unable to work, as Respondent gleans from Section C of the Backpay Claimant Forms (Respondent Exhibit 3), nevertheless, Jones continued to seek work. He did not rely on his subjective belief to justify not looking for a job. Consequently, without

more, Respondent has failed to show that Steward Jones was truly unable to work during that time.

Conclusion

The General Counsel's exceptions should be granted. Judge Locke erred by deferring to the Arbitrator's Award because it was repugnant to the Act. Instead, Judge Locke should have considered the allegations and determined that Respondent violated the Act by terminating Jones for engaging in the protected concerted activity of attempting to enforce the terms of the CBA.

Therefore, the General Counsel asks the Board to grant its exceptions and to find that Steward Jones's actions were an attempt to enforce the terms of the CBA, that Jones' actions were concerted and protected by the Act, and that Respondent violated the Act by terminating Steward Jones for those actions. Further, the General Counsel asks that the Board find Steward Jones is entitled to backpay in the amount set forth in Paragraph 13 of the Amended Compliance Specification - \$40,220.

Signed this 2nd day of December, 2015.

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Certificate of Service

I hereby certify that I have caused a copy of the foregoing Reply Brief has been served on the following, by email, on December 2, 2015:

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